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In The Supreme Court Of The United States

OCTOBER TERM, 1992

CHRISTOPHER N. KOUNNAS, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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87 pp

QUESTIONS PRESENTED FOR REVIEW

1.) Does the "totality of circumstances" presented by an affidavit for search warrant permit a finding of probable cause where (i) the only information about the informant is his name, (ii) the only facts corroborated by police are innocuous and pertain to pre-existing conditions, and (iii) there is no indication when the informant obtained his information about illegal activity?

2.) Does a search warrant meet the requirement that it "particularly described" the things to be seized where it authorizes the seizure of a generic class of goods without any direction as to how the police are to distinguish between stolen and legitimate items?

3.) If the described search warrant is invalid, must the evidence seized thereunder be excluded or may it be admitted under the "good faith" exception?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1992

CHRISTOPHER N. KOUNNAS, JR., Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA COURT OF APPEALS

The Petitioner, Christopher N. Kounnas, Jr., respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Virginia Court of Appeals refusing to suppress evidence obtained from a search warrant that (i) was based on an affidavit failing to show probable cause, and (ii) failed to particularly describe the things to be seized.

REPORTS OF OPINIONS

There is no reported decision in this case by another court. The unpublished opinion of the Virginia Court of Appeals is set forth at A. 40.[1] The decision by the Supreme Court of Virginia refusing to hear the case is set forth at A. 49.

GROUNDS OF JURISDICTION

On November 12, 1992, the Supreme Court of Virginia refused the Petition for Appeal of Christopher N. Kounnas, Jr. The statutory provision believed to convey on this Court jurisdiction to review this decision by writ of certiorari is 28 U.S.C. Section 1257(c).

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[1] Page numbers ("A. ___") refer to the Appendix found at the back of this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are as follows:

(A.) Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(B.) Fourteenth Amendment to the United States Constitution:

> "No state shall...deprive any person of life, liberty, or property, without due process of law..."

The statutory provisions involved in this case are as follows:

Va. Code Section 18.2-108:

> If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.

STATEMENT OF THE CASE

On November 22, 1990, the Chesterfield Police searched the house where Christopher N. Kounnas, Jr., resided with his mother. The search was conducted with the mother's consent. During the search, police seized several commonplace consumer items, including a Yamaha CD player, a Magnavox T.V., a microwave and drills, none of which had any distinguishing marks. They also seized, with the mother's consent, a locked blue footlocker belonging to Mr. Kounnas.

They returned to the police station with the footlocker and applied for a search warrant to examine its contents. Their affidavit for search warrant contained the following language:

> 6.) I was advised of the facts set forth in this affidavit in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts:

> Mr. Wesley Franklin Barnes informed this writer that stolen merchandise was in the residence of Christopher N. Kounnas, Jr., 6920 Berrystone Road, Chester, Virginia 23831. Mr. Barnes stated a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnavox T.V. was in the living room, and a microwave and drills were in the garage. Mr. Barnes stated Mr. Kounnas told him he stole the above-mentioned merchandise and that VCRs and other electronic equipment was in the footlocker. The merchandise was seized during a consent to search and are linked to active investigations in Chesterfield County.
>
> [Complete text found at A. 62.]

A search warrant containing the following relevant language was issued by the magistrate:

> You are hereby commanded in the name of the Commonwealth to forthwith search either in day or night a blue footlocker ...for the following property, objects and/or persons: VCRs, radios, stereos and other electronic equipment. These items are the fruits of the crimes of several burglaries between June, 1990 and August, 1990 in Chesterfield County.
>
> [Complete text found at A. 66.]

Using the warrant, the police searched the footlocker and seized various items of electronic equipment found within it,

including certain items later introduced against Mr. Kounnas at trial.

In January of 1991, Mr. Kounnas was indicted on three felony counts of receiving stolen goods in violation of Va. Code Section 18.2-108. On April 3, 1991, Mr. Kounnas filed a motion to suppress the evidence obtained by the search warrant, based on the legal insufficiency of the search warrant. (A. 58.) On May 28, 1991, a suppression hearing was held, at which time Mr. Kounnas expanded upon his motion, arguing three points:

(i) that the affidavit on which the search warrant was based lacked information needed to assess the credibility,

(ii) that the affidavit lacked information as to the timeliness of the information, and

(iii) that the search warrant was overly broad. (A. 67.)

The motion was denied from the bench (A. 69) and, later, by formal orders (A. 60, 61.) Mr. Kounnas renewed his motion at trial, and the motion was again denied. (A. 69.)

At a trial held on May 29, 1991, Mr. Kounnas was convicted on two of the three counts (A. 50, 54). He was acquitted on the third count. The convictions were based in part on items taken from the footlocker and introduced at trial as having been stolen, over defense counsel's continuing objection. (A. 70.)

Mr. Kounnas appealed his convictions to the Virginia Court of Appeals, arguing in his Petition for Appeal and Brief of Appellant that the trial court erred by denying his suppression motion. (A. 75.) These arguments raised the same three points presented to the trial court. The Court of Appeals affirmed his convictions on June 2,

1992, (A. 40) and denied his Petition for Rehearing on July 1, 1992.

Mr. Kounnas then petitioned the Supreme Court of Virginia for an appeal from that decision, arguing in his Petition for Appeal the same three points previously presented to the trial court and Court of Appeals. (A. 76.) The appeal was refused on November 12, 1992. (A. 49.)

In seeking a writ of certiorari, Mr. Kounnas challenges the sufficiency of the affidavit executed by the police as well as the validity of the search warrant issued by the magistrate.[2] He contends that the evidence seized with the warrant should have been suppressed.

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[2] Although Mr. Kounnas is aware of the limited nature of this Court's inquiry, he is nevertheless compelled to declare his actual innocence of the crimes for which he was convicted. He was not aware that the items in his possession were stolen.

ARGUMENT

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), this Court enunciated a "totality of circumstances" test for determining probable cause, noting that a weak showing on reliability can be remedied by a strong showing on basis of knowledge. 462 U.S. at 234, 103 S.Ct. at 2330. The case at bar raises questions as to the limits of Gates: At what point does weak reliability and a weak basis of knowledge preclude a finding of probable cause? This is an important question of federal law that has not been, but should be, settled by this Court.

As shown below, the reliability of the informant in this case is negligible because the affidavit gives only his name and because the information corroborated by police was wholly innocuous and pertained to pre-existing conditions, not predictions of

future behavior. His basis of knowledge is also weak because the affidavit contains no facts from which a magistrate may infer when he made his alleged observations. (See Part I of Argument.)

In addition to the Gates issue, this appeal furnishes the Court with an opportunity to resolve a conflict among the circuits on the particularly required in describing stolen property to be seized under a search warrant. Here, the warrant authorized the seizure of a generic class of stolen items ("electronic equipment") without any directions on how the police were to distinguish stolen goods from legitimate ones. Whether such a warrant meets the particularity requirement of the Fourth Amendment is an important question of federal law that has not been, but should be, settled by this Court. (See Part II of Argument.)

Finally, this is an appropriate case for writ of certiorari because the magistrate in this case acted as a rubber stamp, and the vagueness of the warrant was so pronounced as to make it facially invalid. Thus, the invalidity of the warrant is not excused by the "good faith" exception to the exclusionary rule set forth in United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984). To the extent that the inapplicability of the "good faith" exception may not be readily apparent, then the limits of Leon are an important issue of federal law that has not been, but should be, settled by this Court. (See Part III of Argument.)

I. THERE IS NO PROBABLE CAUSE FOR THE SEARCH WARRANT BECAUSE OF THE WEAK RELIABILITY AND WEAK BASIS OF KNOWLEDGE.

A. The Reliability of the Informant Is Weak.

The affidavit used to obtain the search warrant gives no reasonable and objective basis for believing the informant, Wesley Franklin Barnes. It does not state whether the informant is an adult or a minor, how long he has lived in the area, whether he has a criminal record or whether he is employed. Likewise, there is no suggestion that he gave reliable information on some previous occasion, or that he previously worked with the police. In short, to the magistrate who issued the warrant, Wesley Franklin Barnes was nothing more than a name.

The Virginia Court of Appeals did not think that Barnes was credible based on any personal information about him. Instead, the Court of Appeals thought his credibility was established because the police confirmed

certain information about the contents of the Kounnas home before preparing the affidavit. (A. 43, 44.) The Court of Appeals erred in that it failed to distinguish between the confirmation of innocent information and the confirmation of facts indicating suspicious activity.

According to the affidavit, the informant told police that "a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnavox T.V. was in the living room, and a microwave and drills were in the garage." (A. 64.) The affidavit also reports that these items of merchandise were seized during a consent search, though it does not say whether they were found in the places where the informant predicted they would be. (A. 64.)

The affidavit then goes on to say that the items seized "are linked to active investigations in Chesterfield". (A. 64;

emphasis added.) Yet, this statement emphatically does not constitute a confirmation of facts indicating suspicious activity. It is, at best, an expression of opinion by the officer about what he believes to be the origin of the goods. His opinion must be disregarded. Probable cause must be based on facts presented by the affidavit. "Mere affirmance of belief or suspicion is not enough". Nathanson v. United States, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933), Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The decision as to whether items seized were the likely fruits of a crime is a decision for the magistrate to make, based on the facts presented to him. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Gates, supra, 462 at 239, 103

S.Ct. at 2333. The magistrate's function cannot be constitutionally delegated to another, even where the conclusion is offered by "a sworn and known and trusted police-affiant." United States v. Button, 653 F.2d 319, 323 (8th Cir. 1981), quoting Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (1974).

The affidavit in question offers no facts by which the magistrate could make an independent determination whether the items seized were likely fruits of crimes. There is nothing suspicious about possession of any of these popular, mass-produced items, especially since they are not described as having specific serial numbers or other distinguishing marks matching them to units reported as stolen. Disregarding the expressions of police opinion, the facts confirmed by the police and reported in the affidavit are wholly innocuous.

In limited circumstances, this Court has allowed reliability to be established by the verification of innocent information; but, those cases have typically involved predictions about future activities as distinguished from conditions already existing at the time of the tip. The classic case on the corroboration of innocent information is Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). There, an informant, who gave no indication of the basis of his information, told police that Draper would arrive in Denver on a train from Chicago on one of two days, and would be carrying heroin. The informant also gave a detailed description of Draper's physical appearance, including the manner of his dress. He also predicted Draper would be walking "real fast." Id., 358 U.S. at 309.

On one of the predicted dates, police in Denver observed a man matching the predicted description exiting a train from Chicago. He was walking rapidly. Having verified every facet of the tip except for whether the individual had heroin with him, the police had grounds to believe that the information about the narcotics was also accurate. Id., 358 U.S. at 313.

In Gates, the Court relied heavily upon the precedent of Draper in finding probable cause based on police corroboration of a tip predicting a suspect's movements. In further explanation of its rationale in Gates, the Court noted a crucial distinction: "the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tips, but to future actions of third parties ordinarily not easily predicted. Id. 462 U.S. at 245; emphasis added. Corroboration

of a prediction about future behavior was similarly used to justify police action in Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

Verifying predictions about future activities may suggest that the informant has such special familiarity with a suspect as to make the informant reliable. On the other hand, verifying reports of existing, innocuous conditions gives no such assurance. For an informant to state that a house contains a T.V. of a particular make, or a footlocker of a particular color, shows only that he was once inside the dwelling or peeked through its windows. It means no more than if he correctly reported the color of the carpet or the paint on the walls. Thus, there was no reason for the magistrate to rely on the mysterious Mr. Barnes when he said the blue footlocker contained stolen goods.

B. The Informant's Basis of Knowledge Is Weak Because There Is No Indication of The Time of His Alleged Observations.

Given the negligible showing of reliability, the affidavit must show a strong basis of knowledge before probable cause can be found. No such basis is provided. In order to establish that an informant has a strong basis of knowledge, it is necessary to show that his facts were obtained recently enough that conditions are unlikely to have changed. Sgro v. United States, 287 U.S. 206, 210, 53 S.Ct. 138, 77 L.Ed. 260 (1932). Stale information cannot be the basis of probable cause.

Whether information of a particular age is stale depends upon the type of information as well as the nature of the crime under investigation. In the case at bar, the offense was the receipt of stolen goods, the possession of which is notoriously mercurial.

The problem with the affidavit, however, is not that it names a time too remote to be timely for such an offense. The problem is that it names no time at all, nor does it offer any facts from which it may be inferred when the information was obtained.

Not only does the affidavit give no specific date, it gives no month, nor even a year. Terms such as "on a recent date" or "in recent weeks" have been said to provide a satisfactory time element, Huff v. Commonwealth, 213 Va. 710, 194 S.E.2d 690, 695 (1973), 194 S.E.2d at 695. (1973); but, the affidavit lacks even these vague and indefinite assertions. Based on what is found in the affidavit, the informant may have obtained his information about Mr. Kounnas even before the June-to-August rash

of burglaries under investigation by police.[3]

In Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966), the Court invalidated a search warrant based on the lack of any information about the time of the informant's observations. Although that warrant was written in the present tense, the Court refused to infer recency:

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[3] Even if it is assumed that the information was obtained at the end of the June-to-August series of burglaries, the information would still not be timely. There were 175 days between the beginning of June, when the burglaries began and the November 22 seizure of the footlocker; and there were 83 days between the end of August, when the burglaries ended, and said seizure. The delay is too long for any information to be considered timely. Schoeneman v. United States, 317 F.2d 173 (D.C. App. 1963), 107 days found invalid; Dandrea v. United States, 7 F.2d 861 (8th Cir. 1925), 42 days found invalid; United States v. Sawyer, 213 F.Supp. 38 (E.D.Pa.1963), 107 days found invalid; Stovall v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972), 72 days found invalid; United States v. Nichols, 89 F.Supp. 953 (W.D. Ark. 1950), 21 days found invalid.

> The present tense is suspended in the air; it has no point of reference.
>
> * * * * *
>
> To create the possibility of ancient information parading beneath the protective mask of a bland, "present tense" warrant would not, in our opinion, be in the interest of proper law enforcement or justice.

356 F.2d at 316, 317.

In the case at bar, the statements of the informant are also "suspended in the air" with "no point of reference". But, unlike the Rosencranz warrant, the warrant here lacks even the mask of the present tense. The statements of the informant are all cast in the past tense.[4] How far in the past is

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[4] "Mr. Wesley Franklin Barnes informed this writer that stolen merchandise was in the residence of Christopher N. Kounnas, Jr., 6920 Berrystone Rd. Chester Va. 23831. Mr. Barnes stated a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnavox T.V. was in the living room, and a microwave and drills were in the garage. Mr. Barnes stated Mr. Kounnas told him he stole the above mentioned merchandise and that VCRs and other electronic equipment was in the footlocker." (A. 64; emphasis added.)

anyone's guess. Thus, there is no basis for inferring that the informant's facts are closely related in time to the issuance of the warrant, and thus there is no basis for finding probable cause.

C. Under the Totality of Circumstances Test, the Search Warrant Is Invalid.

As shown by the foregoing discussion, this case couples weak reliability with a weak basis of knowledge. Based on the affidavit, one may speculate that the police knew more than they said. One may even speculate that, if they had said what they knew, there may have been a basis for probable cause. Such speculation is, however, very different from the reasonable inferences that a magistrate may draw from his review of an affidavit.

If it took no more than what this affidavit offers to establish probable cause, then search warrants could be issued based

on the tip of anyone who knows virtually anything at all about the inside of the house to be searched. "Probable cause" would become an empty phrase and key protections embedded in the Constitution would be seriously eroded. The Petitioner respectfully asks that a writ of certiorari be granted and that the search warrant be declared invalid.

II. THE SEARCH WARRANT IS INVALID BECAUSE IT DOES NOT "PARTICULARLY DESCRIBE" THE THINGS TO BE SEIZED.

> "No warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> (Emphasis added.)

In construing the foregoing clause from the Fourth Amendment, this Court has said, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. U.S., 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927);

emphasis added. See also, Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965), rehearing denied 85 S.Ct. 879, 380 U.S. 926, 13 L.Ed.2d 813. Notwithstanding the plain terms of this Court's pronouncement, the Circuit Courts have widely decided that the rule is not to be applied literally, but is to be "applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity permit." United States v. Waugneux, 683 F.2d 1343, 1349 (11th Cir. 1982), citing, United States v. Lowry, 675 F.2d 593, 595 (4th Cir. 1982); United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981); United States v. Morisse, 660 F.2d 132, 136 (5th Cir. 1981); United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980); United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980); United

States v. Burns, 624 F.2d 95, 101 (10th Cir.), cert. denied, 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980); and United States v. Davis, 589 F.2d 904, 906 (5th Cir. 1979), cert. denied, 441 U.S. 950, 99 S.Ct. 2178, 60 L.Ed.2d 1055.

The Circuit Courts have generally allowed greater latitude in cases involving complex financial transactions and fraud, based on the idea that investigators in those cases often cannot know in advance what they will find in the files to be searched. Waugneux, supra, 683 F.2d at 1349, citing United States v. Abrahms, 615 F.2d 541, 548 (1st Cir.) (1980) (Campbell, J., concurring). By contrast, cases involving the alleged possession of stolen goods, such as the one at bar, are usually quite straight-forward. Police officers should know what has been reported as stolen at the time they apply for the search warrant. Thus, broad generic

descriptions (e.g. "electronic equipment") are highly suspect.

The inadequacy of generic descriptions in cases involving stolen property has been discussed at length by the First Circuit. In United States v. Fuccillo, 808 F2d 173 (1st Cir. 1987), cert. denied, 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 374, that Court dealt with a case remarkably similar to the one at bar. The search warrants in that case authorized the seizure of:

> [C]artons of women's clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the store intended to receive these cartons, such items being contraband and evidence of a violation of Title 18, U.S.C., Section 659, Possession of Goods Stolen from Interstate Shipment."

808 F.2d at 174.

In invalidating the warrant, the First Circuit enuniciated a two-part test for determining when a general description is permissible:

> [F]irst, the degree to which the evidence presented to the magistrate establishes reason to believe that a large collection of similar contraband is present on the premises to be searched, and
>
> [S]econd, the extent to which, in view of the possibilities, the warrant distinguishes, or provides the executing agents with criteria for distinguishing, the contraband from the rest of the individual's possessions.
>
> Id. at 176.

The court focused on the fact that "[the] warrants contained no explanation as to how the executing agents were to differentiate cartons of stolen women's clothing from legitimate goods..." and ruled that the warrants were "conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." Id. at 176.

A similar warrant was invalidated as a general warrant in United States v. LeBron, 729 F.2d 533 (8th Cir. 1984). There, the warrant authorized a search for three

specific items by make, type, and by serial number; however, at the end of the list there was a general description of "property ... believe[d] to be stolen". LeBron at 536. The court found that this language is not specific enough to pass constitutional muster. As the court observed:

> It is simply conclusory language. No guidelines are provided to guide the officers in their execution of the warrant or to limit their discretion. No means of distinguishing between stolen property and property that is not stolen is delineated; moreover, the distinction is not one that is readily apparent. These directions provide no protection against subjecting a person's lawfully held property to a general search and seizure.
>
> LeBron at 537.

The same defect found in Fucillo and LeBron is present here. The warrant directs the executing officer to search for and seize:

> VCRs, radios, stereos and other electronic equipment. These items are the fruits of the crimes of several burglaries between June, 1990 and August, 1990 in Chesterfield County.
>
> (A. 66.)

Thus, the police were directed to search for and seize a broad range of stolen items, but without any guidance as to how to distinguish between stolen and legitimate electronic equipment. The police were left to their own discretion.[5] Plainly, the warrant does not meet the Fuccillo requirement that it provide "criteria for distinguishing the contraband from the rest of the individual's possessions"[6] nor does it meet the Waugneux rule that it be "as specific as the circumstances and nature of

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[5] The problem created by this vagueness is underscored by the fact that only a portion of the items seized were ever the basis of any criminal charge. This fact strongly suggests that the police seized not only what was allegedly stolen, but what was plainly legitimate as well.

[6] The warrant also fails the other prong of the Fuccillo test since there can hardly be a large collection of anything--contraband or otherwise--contained within the confines of a footlocker.

activity under investigation permit." The items to be seized were described as the fruits of burglaries occurring in Chesterfield County over a three month period of time. As part of their investigation of those burglaries, the police undoubtedly prepared offense reports wherein they listed the items reported by the victims as missing. Surely those reports contain more details than the vague descriptions found in the search warrant. Surely, those reports do not simply say that "electronic equipment" is missing but describe the <u>type</u> of equipment and provide some <u>details</u> about the number, make, model, size, color and, possibly, even serial numbers. There is no legitimate reason why those descriptions were not included in

the search warrant, or in the affidavit by which the warrant was obtained. [7]

In contrast to the approach taken by the First and Eighth Circuits, the Second Circuit followed a far more permissive approach in United States v. Scharfman, 448 F.2d 1352 (2nd Cir. 1971), cert. denied, 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 789. There the offense under investigation was the unlawful possession of furs stolen from an interstate shipment in violation of 18 U.S.C. Section 659.

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[7] The Virginia Court of Appeals implied that, because of the "potentially wide variety of merchandise", it would have been overly burdensome to ask that the affidavit and warrant include a more specific description of the property. (A. 48.) This is an unrealistic view. The measure of constitutional rights is not the size of the space provided on the state's standard forms. Moreover, it would have been an easy task for the affiant and the magistrate to have photocopied and incorporated by reference the offense reports containing the full available descriptions of the missing items. Such a step would have told the executing officer exactly what he was to search for and seize.

The search warrant authorized the seizure of "fur coats, stoles, jackets and other finished fur products" without any description allowing investigators to distinguish between stolen and legitimate goods. The Court in Scharfman found such a warrant to be valid, based on its view that "the task of identifying and seizing the specific garments would have required legions of fur experts to perform the task within a reasonable period." Id. at 1354.

There is, however, nothing in the Scharfman decision to indicate that the magistrate was ever presented facts showing that the task required the expertise and herculean effort feared by the Second Circuit. By leaving these factors to surmise, the Second Circuit has taken a tack at odds with the demanding two-prong test applied by the First Circuit.

The different results between Fuccillo and LeBron, on the one hand, and Scharfman, on the other hand, indicates a conflict among the circuits so as to furnish good reason for this Court to grant a writ of certiorari. Alternatively, the degree of particularity required when describing stolen goods is an important federal question that has not been, but should be, decided by this Court. The Petitioner respectfully asks the Court to grant a writ of certiorari and to declare the search warrant invalid on the grounds that it violates the Fourth Amendment's requirement that there be a particular description of the items to be seized.

III. THE EVIDENCE SEIZED UNDER THE INVALID SEARCH WARRANT IS NOT SAVED BY THE GOOD FAITH EXCEPTION. IT MUST BE EXCLUDED.

The evidence seized pursuant to an invalid search warrant will not be subject to the exclusionary rule if the officers who

executed the warrant acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. United States v. Leon, 468 U.S. 897, 921, 104 S.Ct. 3405, 3419 (1984). The Leon exception to the exclusionary rule does not apply, however, "where the issuing magistrate wholly abandoned his judicial role" or where the warrant is "so facially deficient--i.e. in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." Id. 468 U.S. at 923, 104 S.Ct. at 3421.

In the case at bar, this Leon exception to the exclusionary rule cannot overcome any of the defects in the search warrant. The magistrate did not perform his duties in a neutral and detached fashion, but simply acted as a rubber stamp. First,

instead of insisting on facts from which he could draw his own conclusion, he simply adopted the conclusion of the affiant that the items seized during the consent search were probably stolen. (See Part I(A) of Argument.)

Second, the magistrate acted as a rubber stamp when he issued the warrant despite the complete absence of information about time. (See Part I(B) of Argument.) In Rosencranz, supra, when the First Circuit struck down a warrant based on an affidavit with no averments of time, it made the following observations which are also applicable here:

> Officers with information of questionable recency could escape embarrassment by simply omitting averments as to time.... Magistrates would have less opportunity to perform their "neutral and detached" function. Indeed, if the Affidavit in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for them.
>
> 356 F.2d at 316-17; emphasis added.

Finally, the magistrate acted as a rubber stamp when he issued a warrant allowing police to use their own discretion in determining what items should be deemed stolen and, thus, seized. (See Part II of Argument.) Moreover, the absence of directions on the warrant telling the executing officers what to seize was so pronounced to make the warrant facially invalid and thus deprive the prosecution of any claim that the executing officers reasonably relied on it. See Oritz v. Van Auken, 887 F.2d 1366 (9th Cir. 1989).

CONCLUSION

Christopher N. Kounnas, Jr., was convicted based on the introduction of evidence seized from his footlocker under an invalid search warrant. The warrant was invalid because it did not establish probable cause, being based on an affidavit that was fatally weak. The warrant was also invalid

because it failed to describe with particularity the things to be seized. The Leon exceptions to the suppression rule do not apply because the magistrate acted as a "rubber stamp" and because the warrant was facially invalid. The motion to suppress should have been granted. Mr. Kounnas respectfully asks that a writ of certiorari be granted, that his convictions be vacated and that the case be remanded for a new trial with the improper evidence excluded.

Respectfully Submitted,

CHRISTOPHER N. KOUNNAS, JR.

By: Wm. H. Hurd
Counsel

William H. Hurd
Attorney-at-law
2803 McRae Road
Richmond, Virginia 23235

(804) 272-2006

APPENDIX

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Elder and Willis
Argued at Richmond, Virginia

CHRISTOPHER N. KOUNNAS, JR.

v. Record No. 0977-91-2

MEMORANDUM OPINION* BY
JUDGE LARRY G. ELDER
JUNE 2, 1992

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY
William R. Shelton, Judge

Charles R. Watson for appellant.

Thomas C. Daniel, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

Christopher N. Kounnas, Jr., appellant, appeals from his convictions in the Circuit Court of Chesterfield County of two felony charges of receiving stolen goods in violation of Va. Code Section 18.2-108. Appellant was sentenced to twenty-four months on each charge.

On appeal, appellant contends: (1) that the search warrant was invalid due to a lack

*Pursuant to Va. Code Section 17-116.010 this opinion is not designated for publication.

of informant credibility; (2) that the search warrant was invalid because the informant's information was not sufficiently timely; and (3) that the search warrant was overly broad because it failed to particularize the items to be seized. For the reasons that follow, we affirm the judgment of the trial court.

Prior to the request for issuance of the search warrant in this case the police had received information from a known informant that certain items of stolen property were located in the home where appellant lived with his mother. After receiving the mother's permission, a search was conducted of that home. During the search numerous items, including a footlocker, were seized.

On November 23, 1990, a search warrant was issued for "[a] blue footlocker, trimmed in black, with brass colored fixtures and locks, secured with an Abus padlock,

presently at Chesterfield County Police Department." Police had seized the footlocker during the earlier consensual search of appellant's home, and sought authority to search the footlocker for "VCRs, Radios, Stereos, and other electronic equipment." An affidavit stated that the search was requested in relation to a series of burglaries in a local subdivision.

The affidavit in support of the warrant twice identified the source of its information:

> Mr. Wesley Franklin Barnes informed this writer that stolen merchandise was in the residence of Christopher N. Kounnas Jr. 6920 Berrystone Rd Chester Va. 23831. Mr. Barnes stated a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnovox T.V. was in the living room, and a microwave and drills were in the garage. Mr. Barnes stated Mr. Kounnas told him he stole the above mentioned merchandise and that VCRs and other electronic equipment was in the footlocker. The merchandise was seized during a consent to search and are linked to active investigations in Chesterfield County.

This passage appeared in that section of the affidavit identifying "material facts constituting probable cause," as well as in that section establishing the informant's reliability. The property identified in the affidavit was found where and as the informant had predicted.

The trial court denied appellant's suppression motion, ruling that the description of the property sought was sufficiently specific. The trial court also ruled that, because all the items identified by the informant had been found in the consent search as predicted, the informant's credibility was thereby established.

Appellant's first contention on appeal is that the affidavit supporting the search warrant failed to establish the informant's credibility. We disagree.

Each of the items identified by the informant in his tip to the police was found

during a consent search. This is sufficient to establish his reliability. The fact that the affidavit supporting the warrant does not indicate how the informant acquired his information is not determinative.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Spinelli v. United States, 393 U.S. 410, 416 (1969); see also Wheeler v. Commonwealth, 217 Va. 95, 97, 225 S.E.2d 400, 402 (1976); Wayne R. LaFave, Search and Seizure; Va. Code Section 3.3(E) (2d ed. 1987). The fact that numerous items identified by the informant named in the affidavit were found during a subsequent consent search exactly where and as predicted is sufficient to establish his credibility.

Appellant next contends that the search warrant failed to establish that the information provided by the informant was timely. Appellant's argument is based on the supposition that, because the affidavit did not date the information it provided and because the affidavit lacked sufficient information it provided and because the affidavit lacked sufficient information from which the magistrate could reasonably infer a date, any search warrant issued pursuant to it is necessarily stale.

"[A] finding of probable cause to search must be based upon facts reasonably related in time to the date of the issuance of the warrant." Huff v. Commonwealth, 213 Va. 710, 716, 194 S.E.2d 690, 695 (1973). The affidavit supporting the warrant described the thing to be searched as a blue footlocker, in police custody following seizure pursuant to a consent search. Based

on this information alone, the magistrate could reasonably infer that, on the date of the affidavit itself, November 23, 1990, the footlocker was in fact in police custody and had been since its seizure by police. Moreover, based on this inference, the magistrate could without difficulty conclude that, a mere fifteen minutes later, when the search warrant was issued, the footlocker continued to be in police custody.

The issue in this case turns not on the passage of fifteen minutes between the preparation of the affidavit and the issuance of the warrant but on how much time elapsed between the consent search and the preparation of the affidavit. However, because the affidavit plainly stated that the footlocker had been seized during a consensual search, the validity of which is not challenged on appeal, and because the footlocker was at the time in police custody,

the magistrate could reasonably infer that it had remained unopened in police custody from the time of its seizure. As a result, the magistrate could also reasonably conclude that, because circumstance had not changed with respect to the footlocker from the time of its seizure, there did not exist a realistic threat that the evidence at issue had grown stale.

Finally, appellant asserts that the affidavit failed to describe the items sought with sufficient particularity. The affidavit identified the things to be searched for as "VCRs, Radios, Stereos, and other electronic equipment." Considering the small size of the area to be searched, a single footlocker, this brief list was sufficiently detailed.

A key purpose of the particularity requirement is prevention of searches of a general nature. See Wayne R. LaFave, Search and Seizure; Va. Code Section (a) (2d ed. 1987).

However, where the area to be searched is small, the risk that police will use the search warrant as an occasion to conduct a sweeping and invasive search of a suspect's property and effects is obviously reduced accordingly.

Here, relying on a credible informant, police knew they were looking for electronic equipment that, according to the informant, appellant had identified as being both stolen and in the footlocker. The affidavit indicated that the merchandise sought had been stolen during a number of burglaries, a fact that suggests a potentially wide variety of merchandise. It further suggests that police were as specific as possible in their description. Under the circumstances, the description of the merchandise in the affidavit was sufficiently limited.

The judgment of the trial court is affirmed.

Affirmed.

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA
ON THURSDAY THE 12TH DAY OF NOVEMBER, 1992

CHRISTOPHER N. KOUNNAS, JR.,

Appellant,

against Record No. 921229
Court of Appeals No. 0977-91-2

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument in support of the granting of an appeal, the Court refuses the petition for appeal.

And it is ordered that the Commonwealth recover of the appellant the costs in the courts below.

Justice Keenan did not participate in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/
Deputy Clerk

V I R G I N I A :

IN THE CIRCUIT COURT
OF THE COUNTY OF CHESTERFIELD

COMMONWEALTH

v. Upon Indictment for Felony.
(File #CF91F00146) Receiving Stolen Property)
Offense Date: Between 7/25/90 & 11/22/90

CHRISTOPHER N. KOUNNAS, JR., DOB: 8/31/62
SSN: 227-19-9502

On May 29, 1991, the trial of the defendant, Christopher N. Kounnas, Jr., who is charged with receiving stolen property, a felony, began. He, Charles Watson, his attorney, and T. Leslie Lindsey, Jr., Assistant Commonwealth's Attorney, were present.

The defendant was arraigned and pled NOT GUILTY and requested a trial by jury.

The Court impaneled 20 qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. The Court examined the jury on voir dire and

allowed counsel to ask any relevant questions. The Attorney for the Commonwealth and the attorney for the defendant then exercised their right to alternately strike the names of 4 veniremen from the panel and the remaining 12 jurors constituting the jury for the trial of the defendant, were duly sworn as follows:

1.	G. Kalentzos	2.	J.W. Ivey
3.	C. Kelley	4.	A.L. Johnson
5.	K.W. Krustinis	6.	G.G. Johns
7.	T.W. Houston	8.	K.B. Huddleston
9.	R.S. Jones	10.	W.S. Lamm
11.	S.S. Hysell	12.	J.M. Jennings

The Court read its preliminary instructions to the jury and both the Commonwealth's attorney and defendant's attorney made their opening statements.

After hearing all evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We the jury find the defendant guilty of knowingly receiving or concealing property stolen from John E. Dyke as charged in the indictment, and fix his punishment at:

24 months imprisonment

J.W. Ivey
Foreman"

The jurors were then dismissed by the Court.

It being demanded of the defendant if he had anything to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, the Court in accordance with the verdict of the jury rendered this day, sentences the defendant to confinement in the penitentiary of this Commonwealth for a term of 24 months. The defendant must pay Circuit Court attorney fees, court costs of $ 594.00, and any interest that may accrue until the balance is paid in full.

The defendant is remanded to the jail of

this County pending his transfer to the penitentiary.

This case was reported by Roy Wood of Capital Reporting, Court Reporters.

Enter: 6/25/91

/s/
William R. Shelton, Judge

V I R G I N I A :

IN THE CIRCUIT COURT
OF THE COUNTY OF CHESTERFIELD

COMMONWEALTH

v. Upon Indictment for Felony.
(File #CF91F00147) Receiving Stolen Property)
Offense Date: Between 8/18/90 & 11/22/90

CHRISTOPHER N. KOUNNAS, JR., DOB: 8/31/62
SSN: 227-19-9502

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3.	C. Kelley	4.	A.L. Johnson
5.	K.W. Krustinis	6.	G.G. Johns
7.	T.W. Houston	8.	K.B. Huddleston
9.	R.S. Jones	10.	W.S. Lamm
11.	S.S. Hysell	12.	J.M. Jennings

The Court read its preliminary instructions to the jury and both the Commonwealth's attorney and defendant's attorney made their opening statements.

After hearing all evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We the jury find the defendant quilty of knowingly receiving or concealing property stolen from Joseph E. Condon as charged in the indictment, and fix his punishment at:

24 months imprisonment

J.W. Ivey
Foreman"

The jurors were then dismissed by the Court.

It being demanded of the defendant if he had anything to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, the Court in accordance with the verdict of the jury rendered this day, sentences the defendant to confinement in the penitentiary of this Commonwealth for a term of 24 months. The defendant must pay Circuit Court attorney fees, court costs of $ 74.00, and any interest that may accrue until the balance is paid in full.

The defendant is remanded to the jail of

this County pending his transfer to the penitentiary.

This case was reported by Roy Wood of Capital Reporting, Court Reporters.

Enter: 6/25/91

/s/
William R. Shelton, Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

COMMONWEALTH

v. CR91-146, 147, 148

CHRISTOPHER KOUNNAS

MOTION TO SUPPRESS

Comes now defendant, by counsel, and moves this Court to suppress as evidence any object, article, thing, or other evidence gained through a search warrant executed on the 23rd day of November, 1990, at the residence of Christopher Kounnas, 6920 Berrystone Rod., Chester, VA 23831, as being fruits of an illegal search, based on the following grounds:

a. The affidavit on which the search warrant was issued was insufficient as a matter of law.

WHEREFORE, defendant prays and demands that this Court rule the same inadmissible upon the trial of the charge set out by indictment.

CHRISTOPHER KOUNNAS

By: Charlie Watson

CERTIFICATE

I certify that a copy of the foregoing Motion was hand-delivered to the Commonwealth's Attorney at the Courthouse, Chesterfield County, this 3rd day of April, 1991.

Charlie Watson

V I R G I N I A :

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

COMMONWEALTH

v. Upon Indictment for Felony.
(File #CR91f00146) Received Stolen Property
Offense Date: Between 7/25/90 & 11/22/90

CHRISTOPHER N. KOUNNAS, JR., DOB: 8/31/62
SSN: 227-19-9502

On May 28, 1991, appeared Christopher N. Kounnas, Jr., the defendant, Charles Watson, his attorney, and T. Leslie Lindsey, Jr., Assistant Commonwealth's Attorney.

The attorney for the defendant made a Motion to Suppress, which motion the Court denied.

Enter: 6/25/91

/s/
William R. Shelton, Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

COMMONWEALTH

v. Upon Indictment for Felony.
(File #CR91F00147) Received Stolen Property
Offense Date: Between 8/18/90 & 11/22/90

CHRISTOPHER N. KOUNNAS, JR., DOB: 8/31/62
SSN: 227-19-9502

On May 28, 1991, appeared Christopher N. Kounnas, Jr., the defendant, Charles Watson, his attorney, and T. Leslie Lindsey, Jr., Assistant Commonwealth's Attorney.

The attorney for the defendant made a Motion to Suppress, which motion the Court denied.

Enter: 6/25/91

/s/
William R. Shelton, Judge

AFFIDAVIT FOR SEARCH WARRANT

Applicant:

Daniel W. Kelly, Detective
10001 Ironbridge Rd.
Chesterfield, VA 23832

The undersigned Applicant states under oath:

1.) A search is requested in relation to an offense substantially described as follows: A series of burglaries form June 1990 to August 1990 in the Salisbury subdivision in Chesterfield County, Va in which T.V.s, VCRs, Stereos, and tools as well as other electronic merchandise were stolen.

2.) The place, person, or thing to be search is described as follows: One blue footlocker trimmed in black, brass colored fixtured and locks secured with an Abus padlock. The footlocker was seized in a consent to search from the dwelling located at 6920 Berrystone Rd. Chester Va. 23831. The footlocker is presently secured at Chesterfield's Police Department.

3.) The things or persons to be searched for are described as follows: VCRs, Radios, Stereos, and other electronic equipment.
4.) The material facts constituting probable cause that the search should be made are: Mr. Wesley Franklin Barnes informed this writer that stolen merchandise was in the residence of Christopher N. Kounnas Jr. 6920 Berrystone Rd, Chester Va. 2831. Mr. Barnes stated a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnavox T.V. was in the living room, and a microwave and drills were in the garage. Mr. Barnes stated Mr. Kounnas told him he stole the above-mentioned merchandise and the VCRs and other electronic equipment was in the footlocker. The merchandise was seized during a consent to search and are linked to active investigations in Chesterfield County.
5.) The object, thing or person searched for constitutes evidence of the commission of

such offense.

6.) I was advised of the facts set forth in this affidavit, in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts: Mr. Wesley Franklin Barnes informed this writer that stolen merchandise was in the residence of Christopher N. Kounnas Jr. 6920 Berrystone Rd. Chester Va. 23831. Mr. Barnes stated a Yamaha CD player and a blue footlocker was in Christopher's room, a Magnavox T.V. was in the living room, and a microwave and drills were in the garage. Mr. Barnes stated Mr. Kounnas told him he stole the above-mentioned merchandise and that VCRs and other electronic equipment was in the footlocker. The merchandise was seized during a consent to search and are linked to active investigations in Chesterfield County.

The statements above are true and accurate to the best of my knowledge and belief.

Detective

/s/
Applicant

Subscribed and sworn to before me this day. 23 November, 1990 at 11:05 a.m.

/s/
Magistrate

SEARCH WARRANT

COMMONWEALTH OF VIRGINIA

In re/V.

A blue footlocker, brass colored fixtures, trimmed in black. Located in Chesterfield County Police Department.

To any policeman of a county, city or town:

You are hereby commanded in the name of the Commonwealth to forthwith search either in day or night: A blue footlock, trimmed in black, with brass colored fixtures and locks, secured with an Abus padlock, presently at Chesterfield County Police Department for the following property, objects and/or persons: VCRs, Radios, Stereos and other electronic equipment. These items are the fruits of the crimes of several burglaries between June, 1990 and August, 1990 in Chesterfield County.

You are further commanded to seize said property persons, and/or objects if they be

found and to produce before the Chesterfield County Circuit Court an inventory of all property, persons, and/or objects seized.

This search warrant is issued in relation to an offense substantially described as follows: Violation of Section 18.2-89, 18.2-91, 18.2-95, Code of Virginia.

I, the undersigned, have found probable cause to believe that the property or person constitutes evidence of the crime identified herein or tends to show that the person(s) named or described herein has committed or is committing a crime, and further that the search should be made, based on the statements in the attached affidavit sworn to by:

Det. Daniel W. Kelly, Chesterfield P.D.
Name of Affiant

23 November, 1990 at 11:20 a.m.

/s/
Magistrate

EXCERPT FROM SUPPRESSION HEARING

MR. WATSON: If it please the Court, I am here today with reference to a search warrant in this particular case that was signed on 23 November, 1990. In it, it authorized the search of a footlocker and for the following property: TVs, VCRs, radios, stereos, so forth. It will be our contention that this is a general search warrant, it's not specific enough. They allege that these items are the fruit of the crime of several burglaries and yet they don't say what the items are, a Magnovox, TV, serial so on and so forth. If they got this information, it's got to be on there. It's a general search warrant. They want you to take everything they got in that house that relates to a VCR, radio, or stereo or other electronic equipment. It's overly broad and insufficient.

Also on the affidavit for the search warrant, there is not an indication on there whatsoever about when this person, the informant, had been at this particular house or when he had received this particular information. It might have been two years ago, Judge, it might have been a couple weeks.

I would say because it's not in there that we have to assume that it is stale. Again, paragraph 4 of the affidavit, they state the material facts constitute probable cause. They go down to number 6 and the block is checked I was advised of the facts set forth in this affidavit in whole or in part by an informer. This informer's credibility or the reliability of the information is to be determined from the following facts. And they verbatim quote what they had put in paragraph 4. It is not one single mention in there of how they established the reliability of this Mr.

Barnes. Because of those three omissions, it's our contention that the evidence received under the search warrant should be suppressed.

* * * * *

THE COURT: I'm going to overrule your motion to suppress.

MR. WATSON: For the record, Judge, I object to all findings on each of the three areas I brought up.

EXCERPT FROM PRE-TRIAL MOTION

MR. WATSON: I'm going to renew my motion to suppress. It's got to be made a part of this record. I also move to make a part of yesterday's hearing part of this record.

THE COURT: I'll consider your motion made.

MR. WATSON: Without the jury hearing it?

THE COURT: It's in the record.

MR. WATSON: Note my objection for the record also, Judge.

* * * * *

MR. WATSON: May it please the Court, I will inform you that I will have continuing objections to all of the testimony that came out in the hearing yesterday, and I would like to have a continuing objection without having to keep jumping up and down.

THE COURT: I will note for the record that you are making a continuing exception to the ruling I made on the Motion to Suppress.

MR. WATSON: Thank you.

EXCERPT FROM TRIAL
TESTIMONY OF JOHN E. DYKE

Q. You mentioned a pocket TV--some sort of small TV. What was that brand? Do you recall?

A. I don't recall. It's one of those tiny miniature digital ones.

Q. Would it be a Casio perhaps?

A. Exactly.

Q. I would like you to look at several items.

I would ask you if that looks like the television that was taken from your residence?

A. That's exactly the kind. I can't tell you whether this is the exact one.

EXCERPT FROM TRIAL
TESTIMONY OF DANIEL W. KELLY

A. After obtaining the search warrant, the trunk was opened, and inside the trunk were numerous items, two of which were the parts of the Yamaha stereo already mentioned, and a Texas Instrument Financial Analyst, a Mitsubishi remote control for a VCR; a Yamaha remote control for a CD audio unit, and a remote control for a Yamaha CD player; a Nikon 35 mm camera.

* * * * *

Q. Anything else?

A. Two Casio pocket TV's which looked like calculators; another Casio calculator, a brown Duracell flashlight, five black hand gloves, two smashed gold rings--it looked like someone had taken a hammer to them--

* * * * *

Q. Were any other items that were recovered that belonged to these folks without serial numbers found in his possession?

A. ...the Mitsubishi remote control and the brown Duracel Flashlight which were identified by Mr. Condon who said he had items in his home and they were the same that he was now missing.

EXCERPTS FROM PETITION FOR APPEAL TO VIRGINIA COURT OF APPEALS

ASSIGNMENT OF ERROR

The trial judge erred in denying petitioner's motion to suppress.

* * * * *

QUESTIONS PRESENTED

1.) Did failure to establish informer's credibility fatally flaw search warrant?

2.) Did failure to establish timeliness of informant's information fatally flaw search warrant?

3.) Did failure to particularize items to be seized create an overly broad and general search wattant?

EXCERPT FROM PETITION FOR APPEAL TO SUPREME COURT OF VIRGINIA

ASSIGNMENTS OF ERROR

1.) The Court of Appeals erred in ruling that the credibility of Wesley Franklin Barnes was established by the confirmation of the information he "predicted".

2.) The Court of Appeals erred in that it overstated what can be reasonably inferred from the Affidavit.

3.) The Court of Appeals erred in that it failed to distinguish between the confirmation of innocent information and the confirmation of facts indicating fault.

4.) The Court of Appeals erred in ruling that the information set forth in the Affidavit for Search Warrant was timely.

5.) The Court of Appeals erred in failing to address the length of time between the date Wesley Franklin Barnes obtained his information and the date of the Affidavit.

6.) The Court of Appeals erred in ruling that the search warrant was reasonably specific in describing the items to be seized.

7.) The Court of Appeals erred in failing to suppress the evidence found through the search warrant, especially since the invalidity of the warrant is not cured by the good faith exception.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of February, 1993, I filed 40 copies of a Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to Thomas C. Daniel, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

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